Supreme Court, U.S.
FILED
JAN 22 1986
JOSEPH F. SPANIOL, JR
CLERK

(4)

No. 85-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

MOTION TO DISMISS

JANICE E. KERR
(COUNSEL OF RECORD)
HECTOR ANNINOS
ANNE K. MESTER
5066 State Building
San Francisco, CA 94102
Telephone: (415) 557-2380

Counsel for Appellee
The Public Utilities Commission
of the State of California

January 22, 1986

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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The Appellee (the Commission), respectfully moves the Court to dismiss the appeal herein, on the ground that the appeal does not present a substantial federal question.

I

OPINIONS BELOW

The opinions below are correctly stated in the Appellant's (SDG&E's) Jurisdictional Statement.

II

JURISDICTION

Jurisdiction is asserted by SDG&E under Title 28, United States Code Section 1257(2). (Jur. St. 1.)[1]

[1] Reference herein to the Appendix (App.) is to that attached to the Jurisdictional Statement. "Jur. St." followed by a number refers to pages of the text of the Jurisdictional Statement.

III

STATEMENT OF THE CASE

The Appellant, the San Diego Gas & Electric Company (SDG&E), petitions this Court for review of two Commission decisions issued in a proceeding, held pursuant to the energy cost adjustment clause mechanism, to review the reasonableness of SDG&E's recorded fuel costs for the period July 1, 1982 to April 30, 1983. The first of those decisions found SDG&E to have been unreasonable in entering into a long term low sulfur fuel oil contract with the Tesoro Alaskan Petroleum Company (Tesoro); the second decision ordered SDG&E to refund to its ratepayers $45 million in costs resulting from that unreasonableness which the Commission found to be more appropriately assumed by SDG&E's shareholders. In each case, the Commission's decision was made after SDG&E had been given a full opportunity to present evidence sufficient to sustain its burden of proof. In each case, after considering the evidence presented, the Commission concluded SDG&E had failed to meet its burden.

While its conclusions are simply put, this proceeding arose in a much more complex context.

Purpose and Operation of the Energy Cost Adjustment Clause Mechanism

In 1972, the Commission adopted fuel cost adjustment tariff provisions for each of the major electric utilities under its jurisdiction. Prior to this time, such costs had been considered only in general rate cases. These adjustment provisions were designed to forestall the increasingly frequent large over- or undercollections resulting from unanticipated fluctuations in utilities' fuel costs. They provided a considerable measure of revenue stability to the utilities which the general rate case format did not.

The original fuel cost adjustment provisions were replaced in 1975 by the energy cost adjustment clause (ECAC) mechanism, which was further refined in 1980. In current practice, a utility may apply for an adjustment under ECAC every six months.

As the quid pro quo for an automatic pass-through to ratepayers of forecasted fuel costs every six months, the ECAC mecha-

nism provides for an annual review of the reasonableness or prudency[2] of a utility's fuel costs, the "record period" for review being the twelve months ending as of the previous revision date. Were it not for such review, the reasonableness of a utility's fuel costs would go unexamined.

This review is held concurrent with one of the six month adjustment proceedings. The Commission here examines the reasonableness of all recorded fuel costs incurred during the twelve months of the particular review period at issue. In the course of this review, any costs found to have been unreasonably incurred are disallowed from rates. As a rule, the Commission does not consider adjustments beyond the specific review period; however, certain specific costs and issues related thereto can be reserved for later consideration. The contract at issue in the instant case was specifically reserved in this way.

History of This Proceeding

A. SDG&E's Fuel Procurement Policies and Long-Standing Oversupply Problem of the Late 1970's

SDG&E's ultraconservative fuel procurement policies of the early 1970's resulted in chronic low sulfur fuel oil (LSFO) oversupply toward the end of that decade. The company's mistaken assessment of its fuel oil needs over a period of years led to added cost burdens for its ratepayers, particularly the burden of sales—at a loss—of purchased oil, and underlift payments to suppliers for contracted oil that an oversupplied SDG&E could not use. This fuel oversupply problem also at times affected SDG&E's flexibility to use natural gas when that fuel was available as a cheaper alternative.

By the late 1970's, the company had already amassed a considerable record of fuel oil sale losses, occasioned by having to sell some of its excess oil. In Decision (D.) 88225, 83 Cal.P.U.C. 142, issued December 13, 1977, the Commission first addressed this problem in some depth. The Commission found SDG&E to have suffered a net fuel oil sale loss of $4.7 million. In that case,

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[2] The Commission has used these terms interchangeably.

the Commission expressed reservations about SDG&E's fuel procurement policies and ordered SDG&E to hire a consultant to assess them. In addition, the Commission ordered SDG&E to:

> "... develop an extensive record [in the next and future ECACS] on fuel procurement policies and practices, which shall reflect improvements already initiated as well as plans for future improvement." 83 Cal.P.U.C. at 148; Ordering Para. 3.

In D. 89630, 84 Cal.P.U.C. 596, issued November 9, 1978, the Commission found further oil sale losses of nearly $1 million had been incurred. The consultant's study, called the Gilbert Report, was by this time completed. The Commission deferred the issue of how to treat the oil sale losses until the next ECAC proceeding.

Further review of the Gilbert Report was undertaken in proceedings leading to D. 90404, 1 Cal.P.U.C. 2d 596, issued June 5, 1979. While the Report concluded SDG&E's fuel policies had not been imprudent, it criticized those policies in several particulars and urged remedial changes. The weaknesses all stemmed from SDG&E's early and virtually exclusive reliance on LSFO as a fuel source. Most relevant to the instant case was the problem of lack of documentation or adequate alternative studies to support SDG&E's actions on oil sales, procurement, inventory and contract amendments. 1 Cal.P.U.C. 2d at 639. The Report recommended that because "contract provisions are of extreme importance[,] [a]ll contract changes, adjustments and verbal agreements should be documented and confirmed by studies and correspondence for future reference and audit purposes." 1 Cal.P.U.C. 2d at 640-641. Moreover, "[c]lear levels of authority for purchases and negotiation of contract changes, exchanges, and sales have not been delineated." *Id.* at 641. The Report recommended "a review of the organizational placement of the Fuel Resources Department in six months," the primary concern being "the continuing requirement to develop corporate strategy [on] fuels at an executive level where all relevant alternatives can be examined." *Id.* at 641-642. The Report further recommeded preparation of a formal fuel procurement plan, and expansion of the fuel planning process to formally review and forecast future

market conditions as an aid to decisionmaking on long-term oil contracts. *Id.* at 642-643.

The Commission agreed that while SDG&E had not been imprudent, its fuel policies were ultraconservative and reactive, and its current practices needed modification in several crucial respects. The Commission resolved the issue of the oil sale losses which had been deferred by disallowing from ECAC recovery, as against ratepayers' interests, some $3.5 million of the $5 million incurred.

Throughout this period, SDG&E's primary fuel oil suppliers were Tesoro and the Hawaiian Independent Refinery, Inc. (HIRI). SDG&E had initially contracted with Tesoro in 1974, and by 1979 had gone through three amendments to the original contract. The 1979 amendment, termed the 1979 Restated Agreement (Restated Agreement), reduced SDG&E's LSFO takes under the contract by 3,000 barrels per day (bbls/d) for 1979 and 1980. But importantly, it also increased takes for 1981, 1982 and 1983, by 8,000 bbls/d, 16,000 bbls/d, and 7,000 bbls/d respectively. It is this Restated Agreement which is the subject of the instant case.

The Commission did not review the Restated Agreement for reasonableness at the time it was entered into. Coincident with that time, the Commission had initiated a generic investigation of the ECAC mechanism. While the reasonableness of the Restated Agreement was originally included in the above issues, it was not resolved until the case at bar.

Meanwhile, the world fuel supply picture continued to evolve. The greatly increased availability of inexpensive natural gas was the most significant factor for SDG&E and its ratepayers. Its oil oversupply problem radically affected its ability to use that gas as a cheaper alternative. As stated above, its Restated Agreement with Tesoro *increased* its fuel oil contract commitment for 1981, 1982, and 1983. In addition, it had to refuse cheaper natural gas to avoid inventory beyond its capacity, and had, by the end of 1981, incurred another $7 million in losses through sale of excess oil. See D. 82-04-115, 9 Cal.P.U.C. 2d 1, 10-15 (1982). By mid-

1981, as testified to in the instant case, even SDG&E realized that its forecast of limited gas availability was in error.

B. Events Leading Up To the Instant Case

Finally, in April 1982, the Commission issued an order to show cause (OSC) directing SDG&E to demonstrate why the Commission should not require the utility to suspend or reduce deliveries of residual fuel oil scheduled under existing contracts with its two suppliers, Tesoro and HIRI. Testimony in SDG&E's then-ongoing ECAC proceeding gave the Commission reason to believe that SDG&E had contract commitments to purchase 3,500 barrels a day of oil over and above its forecasted requirements, with no sign that SDG&E intended to do anything about amending its contracts. Furthermore, both of SDG&E's contracts had *force majeure* provisions which appeared to excuse performance under only two conditions: an act of God or a governmental order to reduce or suspend deliveries.

SDG&E's reply to the OSC admitted that its oil supply exceeded requirements by 10,000 bbls/d, but asserted it was negotiating with Tesoro to reduce deliveries by 6,000 bbls/d. The decision in the ECAC case, issued a day prior to SDG&E's filing its reply to the OSC, found SDG&E's procurement policies both unimaginative and unrealistic, appearing "to be driven by its oil contract obligations rather than by reasonable projections of need and reliability." D. 82-04-115, *supra*, 9 Cal.P.U.C. 2d at 21. The Commission set SDG&E's oil inventory level (one of the items established in an ECAC proceeding) such that SDG&E had to reduce its oil supply by about 15,000 bbls/d or face a shareholder penalty of 50% of the carrying costs of the excess inventory. Moreover, the Commission warned SDG&E that continuation of its oil oversupply was "of such a serious nature that SDG&E is placed on notice that we will consider a penalty in future ECAC annual reviews if SDG&E fails to relieve the excess oil and gas rejection problems in the reasonably near future. SDG&E's ratepayers will not be forced to continue to underwrite the status quo." *Id.* at 23.

SDG&E finally worked out a tentative agreement with Tesoro for the latter to suspend all deliveries from October 1, 1982 to

December 31, 1983. A condition precedent for this agreement to be signed by Tesoro was that the Commission drop the OSC. The Commission did so, but stated that such action did not constitute a finding on the reasonableness of this latter agreement, called the Suspension Agreement, or any charges to be incurred by SDG&E because of it.

The reasonableness of this Suspension Agreement was an issue in the instant case. Prior to resolving the issue as noted below, the Commission allowed $45 million in underlift charges which, under the terms of the Suspension Agreement, SDG&E had to pay to Tesoro, to be recovered, *subject to refund,* under ECAC.

C. The Instant Case

Early in the course of the twenty-nine-day evidentiary hearings in the instant case, the City of San Diego (City) moved that the Commission should be reviewing not only the reasonableness of the Suspension Agreement, but of the 1979 Restated Agreement which had established SDG&E's residual oil contract requirements through 1983, and which had been the subject of the Commission's OSC. The Administrative Law Judge (ALJ) granted the City's request, thus the reasonableness of the Restated Agreement also became an issue in the case.

Under protest, SDG&E produced a witness to testify as to the reasonableness of the Restated Agreement, after its motion to overturn the ALJ's ruling sustaining the relevancy of this issue had been denied. During the hearings, the ALJ took official notice of the Gilbert Report. Testimony was also presented by SDG&E and the Commission staff on the issue of the reasonableness of the subsequent Suspension Agreement.

SDG&E's witness on the subject of the Restated Agreement was not one of the negotiators of the Restated Agreement and had not ever read it, although he signed it for the company. Reporter's Transcript (R.T.) 2717, 2732. He knew only vaguely of studies, not directly relating to Tesoro, which may have had some indirect impact on SDG&E's view of the reasonableness of the Agreement. R.T. 2737. He was uncertain whether the Company considered any but a few very limited alternatives to the Agreement, and had not provided the Commission with any such studies or

alternatives in the instant proceeding. R.T. 2737-2743. After consideration of this direct testimony and extensive cross examination by staff and the City, the Commission issued the Interim Opinion, D. 84-02-005. This decision, *inter alia*, found SDG&E to have been unreasonable in entering into the Restated Agreement, for several interrelated reasons.

From the evidence presented, the Commission concluded that SDG&E had given up a more flexible oil supply situation for a less flexible option which provided, at most, marginal benefits; that SDG&E was motivated largely by the short-term benefits the Restated Agreement could provide to its shareholders at the long-term expense of its ratepayers; and that despite serious criticisms of SDG&E's fuel procurement practices as set forth in the Gilbert Report, SDG&E continued those practices by making the decision to enter the Restated Agreement without having adequately analyzed the long-term risks and liabilities this contract posed. See D. 84-02-005, App. A13-A21; Findings 12-21; Conclusions 1-4, App. A23-A25. As a consequence of all this, the Commission found the issue of reasonableness of the Suspension Agreement moot. The Interim Opinion deferred the issue of a possible disallowance to a further decision, pending receipt of additional evidence on the "actual consequences" of the Restated Agreement, and the financial impact on SDG&E of a disallowance. SDG&E then filed a timely application for rehearing.

At the beginning of the disallowance phase, the Commission staff argued that much of the testimony prepared by SDG&E for this phase relitigated issues already decided in the Interim Opinion and moved to exclude this testimony. The City joined in the staff's motion. SDG&E replied that it was not attempting to relitigate issues already resolved, and requested leave to submit by letter legal authorities supporting its position on the appropriate measure of damages. After reviewing letter briefs submitted by all the parties on the relevant legal authorities, the ALJ, supported by the Commissioner assigned to the proceeding, issued a ruling excluding most of the testimony. Further hearings commenced in early April, 1984.

The Commission issued the Final Opinion, D. 84-12-026, on December 5, 1984. After setting forth in detail the positions of the

parties and analyzing their strengths and weaknesses, this decision found, *inter alia*, that a disallowance of up to $70 million would have little adverse financial impact on SDG&E after 1984, that the parties had presented various different disallowance figures ranging from $97 million to $4.55 million based on different ways of measuring the actual consequences of the Restated Agreement, and that a disallowance of $45 million was the most appropriate and the most equitable. The decision also agreed with the ALJ that SDG&E had attempted to relitigate issues resolved by the Interim Opinion. See D. 84-12-026, App. A34-A43, A46-A59.

Finally, the decision discussed once again the Commission's original conclusion that the Restated Agreement was unreasonable in light both of SDG&E's claim that the Interim Opinion had found only SDG&E's procedures and motivations to be unreasonable but not the Restated Agreement itself, and its further claim that the HIRI contract offered no flexibility. After rejecting the first claim out of hand, the decision discussed at length additional evidence taken in the disallowance phase which wholly confirmed the earlier conclusions on the HIRI contract. App. A59-A63.

SDG&E filed a timely application for rehearing of D. 84-12-026. Both of its applications were denied in D. 85-04-111, which modified and clarified D. 84-12-026 but did not change the result. SDG&E then filed a petition for writ of review with the California Supreme Court. By its order of September 24, 1985, that Court unanimously rejected SDG&E's claims on the merits, without the necessity of hearing further argument.

ARGUMENT

SDG&E'S DUE PROCESS CLAIM IS INSUBSTANTIAL

I. SDG&E Has Presented No Overriding Reason Why This Court Should Grant Review

A. Denial of Review By the California Supreme Court Does Not Justify Review By This Court

SDG&E appears to argue that the California Supreme Court's unanimous rejection of SDG&E's petition for writ of review without issuing a writ deprives it of the serious appellate review to

which it is entitled. Jur. St. 9-10, 28. Nothing could be further from the truth. Over 20 years ago, the California Supreme Court held in *People v. Western Air Lines, Inc.*, 42 Cal.2d 621, 630, 268 P.2d 723, *appeal dismissed*, 348 U.S. 859 (1954) that summary denial of a petition for writ of review of a Commission order is a decision on the merits as between the parties, on all questions of fact and law presented in the petition. The California Court has consistently followed this principle and has recently reaffirmed it in *Consumers Lobby Against Monopolies v. Public Utilities Comm.*, 25 Cal.3d 891, 901, 160 Cal.Rptr. 124, 603 P.2d 41 (1979).

The California Legislature has made the California Supreme Court the sole forum for appellate review of Commission decisions. California Public Utilities Code Section 1759; see also Sections 1756-1758, 1760. It must be presumed that the California Court knows it is the sole forum and that its orders denying review are conclusive on all factual and legal questions presented. Accordingly, it must also be presumed that its denial without issuing a writ is only done after serious consideration and with full awareness of the legal impact of its decision.

In the instant case, the clear import of the Court's order is that SDG&E failed to set forth sufficient grounds to warrant plenary treatment. Implicit in that order is the finding that the Commission's decisions were fully consistent with both state law and federal due process requirements. *People v. Western Airlines, supra; Consumers Lobby, supra.*[3] The Court's summary denial of review has not denied SDG&E appellate review or any other aspect of due process.

B. SDG&E's Attempt to Link This Case With Other Prudency Reviews is Misplaced

SDG&E attempts to magnify the significance of this case by asserting it is connected to other fuel cost adjustment cases and

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[3] Inasmuch as none of the procedural defects discussed in the *Consumers Lobby* opinion, 25 Cal.3d at 902-905, is pertinent to the instant case, denial of SDG&E's petition could only have been for want of substantive merit.

major plant addition applications now before the Commission, and even before other commissions across the country. SDG&E argues that the constitutional infirmities purportedly raised by the case at bar, if allowed to go uncorrected, will present substantial barriers to utilities in these other cases. SDG&E's attempt to link these cases is inaccurate and misleading.

The Commission has been conducting reasonableness reviews of utility fuel costs for the last ten years. These cases are not dependent on or related to each other except for general policy direction. They all depend for their outcome, as does any rate case, on the particular facts before the Commission. SDG&E admits it does not protest either the ECAC mechanism or the Commission's standard of reasonableness, but rather only the application of that standard to the facts of this case. Jur.St. 13.

Prudency reviews of major utility plant additions are even further removed. Such cases involve review of the reasonableness or prudency of a utility's investment in a major new plant which has just or will soon become operational, e.g., the $6.0 billion investment in the Diablo Canyon Nuclear Project, prior to inclusion of any of that investment in the utility's rate base. Only prudent investment costs will be allowed. These reviews were at one time conducted as part of a utility's general rate case. However, the amounts of money at stake and complexity of the issues raised have increased so dramatically for many of these major projects that it has become essential to review the reasonableness of the utilities' investment costs in separate proceedings. This, however, does not connect these cases with SDG&E's case, any more than if they were still part of general rate cases.

Again, the outcome of each case will be dependent on its own facts. None of the cases referred to by SDG&E involves facts even remotely similar to those of the case at bar. The only similarity between the two types of cases is that they both look back to expenses already incurred or investment already made, and do not set rates prospectively. That is where the similarity ends.

SDG&E has not shown how this case, decided on its own facts, will have any impact whatsoever on any other party's due process

rights in any other case before this Commission or other commissions in other jurisdictions.

II. The Jurisdictional Statement Raises No Substantial Due Process Question

Although its arguments are less than clear, SDG&E appears to attack the Commission's decision as violating due process on the four following grounds: 1) the Commission impermissibly used hindsight in judging SDG&E's actions; 2) the Commission's finding of imprudence was not supported by substantial evidence; 3) the Commission failed to find a reasonable alternative and rejected SDG&E's evidence relative thereto; and 4) since the $45 million disallowance is unfair, the Commission should be estopped from imposing it.

In raising these arguments, SDG&E does nothing more than reargue the facts of this case. SDG&E would have this Court substitute its judgment for that of the Commission in assessing the evidence presented. That is a role which this Court has repeatedly declined to play. In suits involving the validity of rates[4] set by a state commission, this Court will not sit as a board of revision, but will concern itself only with whether constitutional rights have been violated. *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393 (1938); *Los Angeles Gas & Electric Corp. v. Railroad Comm.*, 289 U.S. 287, 304-305 (1933).

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[4] Although procedurally SDG&E appears to characterize this case as something other than a ratemaking matter (Jur.St. 4, 10), a reasonableness review of a utility's fuel costs is clearly a part of the Commission's ratemaking responsibility, and has long been recognized as such by the California Supreme Court. See *Southern California Edison Co. v. Public Utilities Comm.*, 20 Cal.3d 813, 144 Cal.Rptr. 905, 576 P.2d 945 (1978). It *is* different from prospective general rate cases in that fuel-related costs are passed on to the utility through rates as they are incurred; in exchange, the reasonableness of those fuel costs is examined retrospectively once each year. This is the only review given to such costs. Any disallowance the Commission may order signifies not only that a given cost was unreasonably incurred, but that the rates set earlier to collect that cost were also unreasonable. It is, emphatically, a rate case, the basic character of which is not altered because the form of review is adversary in nature.

A careful reading of the Commission's decisions confirms that such is not the case here.

1. The "Hindsight" Argument

SDG&E provides no authority, other than a passing reference to Webster's New Collegiate Dictionary, for the proposition that the federal right to due process would preclude the Commission from deciding the reasonableness issue through hindsight. More importantly, SDG&E's fundamental assumption that the Commission here used hindsight is erroneous.

In the case at bar, the Commission extended its retroactive review further back than usual because the reasonableness of the contract at issue had been specifically reserved and never considered. Several subsequent decisions approved expenses under that contract for specific periods of time, but the reasonableness of the contract itself had never been examined, nor had SDG&E ever asked for or received confirmation from the Commission that it considered the contract to be reasonable. In no sense of the word did the Commission's action in reaching back to review the reasonableness of the Restated Agreement constitute hindsight.

Furthermore, the Commission's conclusion on gas forecasts was based not on hindsight, but on the facts and circumstances existing at the time the Restated Agreement was entered into. In general, the gas forecasts being used at the time *were* overly pessimistic. But by late 1978, SDG&E had a significant history of using and formulating inaccurate forecasts. Ignoring past experience, SDG&E did absolutely nothing to evaluate the continued use of such forecasts before entering the Restated Agreement. The point is, as the Commission observed in its Final Opinion, that prudent utility management would have recognized in 1979 that since its forecasts had this highly uncertain history, the company should maintain and try to increase its fuel mix flexibility to allow for unexpected conditions. App. A61. This conclusion is hardly an application of hindsight.

2. The "No Substantial Evidence" Argument

SDG&E contends the Commission's findings and conclusions on the HIRI contract and on SDG&E's risk/benefit analysis are

not supported by substantial evidence. These claims are wholly without merit.

SDG&E alone had the burden of proving that its action in signing the Restated Agreement was reasonable. The Commission has stated that this burden means a party must show, through clear and convincing evidence with percipient witnesses, that its expenditures were reasonable. D. 92496, 4 Cal.P.U.C. 2d 693, 701 (1980); D. 83-05-036, unpublished (May 4, 1983).

The Commission's ultimate finding of unreasonableness was made after considering SDG&E's testimony and cross examination thereof. SDG&E had every opportunity to satisfy its burden of proof. The Commission properly found this burden had not been satisfied, and found SDG&E unreasonable in five particulars, two of which involved the HIRI contract option and SDG&E's risk/benefit analysis. D. 84-02-005, App. A16-A18, A21, A25; see also D. 84-12-026, App. A59-A63.[5] The Commis-

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[5] As a reading of the Commission's two decisions makes clear, SDG&E has misidentified the number of factors contributing to the Commission's unreasonableness finding. Jur.St. 17. There is, moreover, evidence sufficient to support both of the elements SDG&E criticizes.

Concerning the HIRI contract, the ALJ had taken official notice of SDG&E's consultant's report, the Gilbert Report (see p. 4 of this Motion, *supra*), during the reasonableness phase, without objection from SDG&E. R.T. at 3052-3053. That Report contained a table showing HIRI contract changes through Amendment 6 and proposed Amendment 7. The Commission's conclusions on the HIRI contract were based on the language of the contract, knowledge of SDG&E's and HIRI's past practices under the contract, and a proper inference drawn from SDG&E's own testimony that SDG&E had not seriously examined the HIRI option. See D. 84-02-005, App. A15-A17; Finding 14, App. A23.

SDG&E petitioned for rehearing on this issue. While the Commission did not grant rehearing, the ALJ specifically examined SDG&E's witness on the issue during the disallowance phase. By that point in the proceeding, SDG&E knew the Commission's conclusions on HIRI. It had an opportunity to refute them on the record. But its witness, when specifically questioned by the ALJ, was unable to do more than confirm the Commission's earlier conclusions. (R.T. 3573-3574; D. 84-12-026, App. A61-A62.)

sion drew different inferences from SDG&E's evidence than SDG&E hoped it would. But such is wholly within its prerogative as trier of fact, and does not constitute a denial of due process of law.

United States v. Abilene & Southern Ry. Co., 265 U.S. 274 (1924) is inapposite. In that case, this Court disapproved a commission's taking judicial notice of all the plaintiff carriers' annual reports on file with the commission *as a whole*, without notice to the parties as to just what information from those reports it was going to examine. In the instant case, the Gilbert Report addressed, in a more generic way, the very question at issue before this Commission, i.e., the reasonableness of SDG&E's fuel acquisition policies. Information on the HIRI contract was also available to the Commission through SDG&E's Exhibit 1 in the OSC proceeding (see p. 6 of this Motion, *supra*), and the contract itself was on file with the Commission. Even if it could possibly be construed that the Commission improperly went outside the record to get information on the HIRI contract during the reasonableness phase, this was completely cured during the disallowance phase. SDG&E has pointed to nothing denying it due process.

SDG&E's second assertion, on risk/benefit analysis, is equally without merit. The Interim Opinion goes through the analysis for four years of the contract. App. A16-A17. While the probability of excess LSFO was reduced in the first two years, this probability increased for 1981 and 1982 such that the net result came out just about even. Moreover, the only study relied on by SDG&E's witness had stated that the projected volumes under the Restated Agreement would have an expected value net savings of $500,000 over the base case of doing nothing to the existing contract; this is hardly the same as comparing benefits and burdens of the Restated Agreement itself.

The record amply supports the Commission's conclusions that the Restated Agreement provided marginal benefits at best, and those on a very short-term basis. More importantly, the record enabled the Commission to conclude that given SDG&E's almost complete failure to analyze other alternatives, this factor was one manifestation of SDG&E's imprudence.

Finally, SDG&E's argument that the shielding of shareholders element is irrelevant to a finding of unreasonableness (Jur.St. 17) is self-serving and finds no basis in the decision. See App. A17-A18, A21. It should be rejected out of hand.

It has long been the rule that this Court, in considering the question of sufficiency of evidence to support an administrative order, must and does rely largely upon a reviewing court's conclusion. *Radio Corporation of America v. United States*, 341 U.S. 412, 415 (1951); *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491 (1951). This Court will normally not interfere with findings of fact of a state utilities commission which have been approved by a lower court. *United Gas Public Service Co. v. Texas*, 303 U.S. 123 (1938); *Georgia R. & Power Co. v. Railroad Comm.*, 262 U.S. 625 (1923). Here, the California Supreme Court has affirmed the Commission's interpretation of the evidence. SDG&E has given this Court no good reason to interfere with that judgment.

3. The "Alternative Action" Argument

SDG&E has never, throughout the course of this case, made any attempt to provide relevant authority for its assertion—raised only *after* the reasonableness decision had been issued—that the Commission had a duty to determine what a reasonable course of action would have been before determining a disallowance. SDG&E does present a lecture on principles of recovery of damages in tort law, but fails to demonstrate the relevancy of those principles or the cases it cites to public utility regulation, to the Commission's role in reviewing the reasonableness of fuel costs, or to this specific case.

Moreover, SDG&E by its own admission concedes the Commission's point on the issue of the excluded testimony. SDG&E states: "... it is the only evidence anyone offered which attempted to address the issue of what SDG&E should have done in 1979 with respect to its existing fuel supply status." Jur.St. 23. It was excluded because it addressed, if anything, the reasonableness of the Restated Agreement, an issue already decided, on which SDG&E had had its day in court. As the Final Opinion found, the testimony did not in any way address the actual consequences of the Restated Agreement or financial impact on SDG&E, the two issues reserved for consideration in the second phase of hearings. App. A59-A60. Its exclusion did not deny SDG&E due process of law.

4. The "Estoppel" Argument

SDG&E ends by recasting its earlier arguments into one which would have the Commission and not SDG&E responsible for SDG&E's having entered the Suspension Agreement. Thus it contends the Commission should be estopped from assessing to SDG&E's shareholders the $45 million in underlift charges the company had to pay under the terms of the Suspension Agreement.

Most importantly, this argument was not raised to the California Supreme Court. It is, therefore, improperly raised here, and should be rejected without further consideration. *United States v. Ortiz*, 422 U.S. 891, 898 (1975).

Moreover, the issue in this case is *not* the Suspension Agreement, but the Restated Agreement. But for the Restated Agreement, SDG&E would not have incurred those charges. They were, in the clearest sense, an "actual consequence," not of any Commission action, but of SDG&E's own decision to enter the Restated Agreement. It is hardly a denial of due process that the Commission imposed this disallowance, which is some $50 million below the highest figure supported by the record. App. A56.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss SDG&E's claim for want of a substantial federal question.

Respectfully submitted,

JANICE E. KERR
HECTOR ANNINOS
ANNE K. MESTER
Attorneys for Appellee
The Public Utilities
Commission of the
State of California

January 22, 1986